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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

Owasso Independent School District No. I-011, *et al.*;
Petitioners,

v.

Krista J. Falvo;
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, NATIONAL ASSOCIATION OF FEDERALLY IMPACTED SCHOOLS, COLORADO ASSOCIATION OF SCHOOL BOARDS, KANSAS ASSOCIATION OF SCHOOL BOARDS, NEW MEXICO SCHOOL BOARDS ASSOCIATION, OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION, UTAH SCHOOL BOARDS ASSOCIATION

IN SUPPORT OF PETITIONERS

SHELDON E. STEINBACH
Vice President and General Counsel
American Council on Education
One Dupont Circle, Suite 800
Washington, D.C. 20036
(202) 939-9355

MARTIN MICHAELSON
ALEXANDER E. DREIER
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

*JULIE UNDERWOOD
JULIE E. LEWIS
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

**Counsel of record*

Counsel for Amici Curiae

28 pp

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STATEMENT OF INTEREST OF *AMICI* [1]

Amici are national associations that represent public and independent primary, secondary, and higher education institutions and the educators who serve them. *Amici* believe that to subject to FERPA regulation the peer-grading practice at issue in this case, as well as similar instructional techniques common in classrooms across the country, involving students at all levels, would impede education of students. It would also interpose courts in pedagogy, a field the American judiciary has soundly held to be educators' domain.

Founded in 1940, *amicus* National School Boards Association ("NSBA") is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation. The following federation member state associations from the Tenth Circuit also support Petitioners and represent similar interests in this case: Colorado, Kansas, New Mexico, Oklahoma, and Utah.

Amicus American Council on Education ("ACE") represents all sectors of American higher education. Its

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1/ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of all of the parties and letters of consent from counsel for the parties have been filed with the Clerk.

approximately 1,800 members include a substantial majority of colleges and universities in the United States. Since its founding in 1918, ACE has sought to promote high standards in higher education, in the belief that a strong higher education system is the cornerstone of a democratic society. ACE's initiatives address issues of national importance, ranging from higher education quality and affordability to the responsiveness in other respects of colleges and universities to the nation's needs.

The American Association of School Administrators ("AASA"), founded in 1865, has a membership of more than 14,000 educational leaders. AASA seeks to achieve the highest quality of public education through effective school leadership.

The National Association of Independent Schools ("NAIS") is a voluntary membership organization that represents over 1,100 independent pre-collegiate schools nationwide. NAIS strives to provide its schools with appropriate principles of good practice, promoting high standards of academic excellence, affordable access to independent education, and diversified school communities. NAIS initiatives reflect areas of national concern, particularly when they involve the consequences of member schools accepting federal funds.

The National Association of Federally Impacted Schools ("NAFIS"), founded in 1973, is a not-for-profit association representing the interests of more than 1,500 local education agencies which receive federal impact aid. Each member school district is governed by a locally elected school board, and together these school districts serve more than 15 million children.

SUMMARY OF ARGUMENT

The court of appeals held that Petitioners violated the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, because teachers in the Owasso Independent School District employed "peer-grading" in their classrooms. Peer-grading is an instructional technique, often used in the context of class discussion, in which students exchange papers while a teacher reviews in-class work or homework. Students mark answers, noting correct responses on classmates' papers. Many educators view peer-grading as a valuable instructional tool that enables students to learn from classmates and that permits teachers to use classroom time efficiently. Peer-grading is common nationwide in primary and secondary schools as well as college classrooms.

The court of appeals interpreted a provision of FERPA – which by its terms speaks only to "reveal[ing]" "records" "maintained" by schools, colleges, and educational agencies or their agents – as covering the common peer-grading practice. Under that court's interpretation, FERPA's elaborate procedures and stringent nondisclosure provisions would cover not only files and records kept in school offices, but would also reach evaluations assigned to homework, quizzes, tests, and other student work, even when the evaluation is never recorded in the student's school file or record. That holding contravenes the statute's plain meaning, defies common sense as confirmed by the legislative history, conflicts with the settled interpretation by the agency authorized to implement FERPA, and would entail massive federal regulation of conventional classroom interactions of teachers and students.

The court of appeals' novel interpretation would profoundly affect how teachers across the country educate students. It would bar not only peer-grading but also many

other commonly utilized, benign, and effective instructional methods that involve student review of others' work, teacher evaluation of work in a group setting, and the like. The effect of such a doctrine would be to proliferate lawsuits against school districts. And the holding is contrary to the overwhelming weight of authority that teachers' evaluations of students are not subject to judicial review.

The Court may reverse the court of appeals without determining the merits of Respondent's FERPA claim, because, as shown below, the provision at issue is not privately enforceable in an action under 42 U.S.C. § 1983. But even if Section 1983 were available to enforce FERPA, the school district defendant in this case would be immune from suit, because Respondent never established that the violations she alleged resulted from a pattern or practice of the Owasso School Board.

ARGUMENT

I. IN-CLASS PEER-EVALUATION AND SIMILAR EDUCATIONAL TECHNIQUES ARE OUTSIDE THE SCOPE OF FERPA.

The court of appeals erred in holding that the peer-grading instructional activity in this case violated FERPA. That holding rested on the court's determination that the grades students place on other students' work are "education records," a construction that would vastly expand FERPA's reach. The court's interpretation conflicts with the statute's plain meaning, legislative history, and interpretations by the federal agency authorized to implement FERPA.

A. In-class Evaluations by Students of Other Students' Work Are Not FERPA "Education Records".

FERPA defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). *See also* 34 C.F.R. § 99.3. Students who record grades on one another's papers do not "maintain" "records, files, documents and other materials." 20 U.S.C. § 1232g(a)(4)(A). To describe what students are doing in these circumstances as "maintaining" a record, as the court of appeals did, is contrary to the plain meaning of "maintain," which denotes "keep in an existing state (as of repair, efficiency, or validity)" or "preserve from failure or decline." *Webster's Ninth New Collegiate Dictionary* 718 (1990). Students who mark one another's homework papers and quizzes may *inscribe* grades and even temporarily *possess* them, but they do not keep them in a "state" of "repair, efficiency, or validity," nor "preserve [them] from failure or decline," and hence do not maintain them. Had Congress intended FERPA to reach notations made by students before they are placed in school files, it could have made FERPA apply to records "made" or "possessed" by such persons. It did not. Instead, Congress sensibly determined that FERPA reaches only records "maintained" by educational institutions and agencies or those who act for them. Because the grades at issue were not maintained by the student-graders, they were not education records when the students viewed them. On these grounds alone, the court of appeals' decision should be reversed.

The court of appeals believed that student grades become "education records" once they are recorded in a teacher's grade book. (Petitioners' Appendix at A-21.) On

that faulty premise, the court reasoned that grades students write on other students' work also are "education records," even before the teacher records them. In so holding, the court made two errors.

First, FERPA plainly provides that grade books and other records kept by teachers are *not* "education records" if "not accessible or revealed to any other person except a substitute." 20 U.S.C. § 1232g(a)(4)(B)(i). There is no evidence here that the teachers disclosed grade books, or any grades contained in their grade books, to anyone. To the contrary, the evidence relied on by the court of appeals showed only that students informed the teacher of other students' grades *before* the grades were ever recorded in a grade book. Thus, the teachers' grade books were not education records, because they were "not accessible or revealed to any other person." *Id.* How grades could be "education records" *before* being entered in grade books, as the court of appeals held, when FERPA plainly provides that they were not education records even after entry in the grade books, the court of appeals did not explain.

Second, even setting aside the express statutory exemption of grade books from FERPA's coverage, the court of appeals disregarded the distinction between disclosure of a grade contained in school files and disclosure of a grade that has not been recorded in such files. Yet that is precisely the distinction Congress drew in FERPA, which bars disclosure of education *records*, but not of all *evaluation* of student work, such as a grade given for a single assignment, that might eventually find its way into a student record. *See Falvo v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1201, 1202-1203 (10th Cir. 2000) (Kelly, J., dissenting from denial of rehearing en banc) (recognizing the "obvious difference between grades entered in a grade book (a collective record of the teacher), and the individual grades (on student papers) that are not recorded in a grade book" and the

"difference between a final grade placed on a transcript and the individual scores that determine the final grade").

To adopt the court of appeals' interpretation of "education records" would be destructive to sound, widespread classroom practice. On that court's view, a teacher's evaluation of a student would be an "education record" when made, if the teacher later recorded it in a written evaluation or notes placed in the student's file. That interpretation would render a vast, indeed staggering, amount of ordinary communication between students and teachers subject to FERPA's rigorous "education record" obligations. For example, suppose (1) Johnny hits Mary; (2) the teacher tells Johnny, in Mary's presence, "I do not approve of what you did"; and (3) the teacher later records the incident in Johnny's year-end evaluation. Under the court of appeals' view of education records, the teacher disclosed to Mary an education record pertaining to Johnny and thereby violated FERPA. A teacher could not compliment a child's artwork in the presence of other students were the compliment later recorded in an evaluation. And countless other illustrations of conventional and proper educational interaction would be forbidden. Of course Congress intended no such bizarre consequence; nothing in the language or history of FERPA suggests so. Yet such results follow under the holding below. Congress drew a clear line in FERPA between education "records" and the individual grades and other evaluations and assessments that are shared in the classroom. It is not the teacher's in-class assessment of classroom work that FERPA addresses; else federal law would be violated every time a teacher corrected a student's oral answer in class.

The court of appeals' reading of "education records" also cannot be harmonized with the structure of the statute. FERPA requires institutions to permit parents and eligible

students to inspect and review their "education records," 20 U.S.C. § 1232g(a)(1), and to challenge at a hearing disclosure of "education records" the student or parent believes "inaccurate or misleading." 20 U.S.C. § 1232g(a)(2). Those provisions are consistent with the view that "education records" are material recorded in school files; a school can provide a right of access only to records that it maintains.

By contrast, the view that "education records" includes grades a student writes on another's work, which may or may not subsequently be recorded in school files, would have peculiar and unprecedented consequences when applied to § 1232g(a)(1) and § 1232g(a)(2). First, it would be virtually impossible for schools to comply with those provisions, because they would be required to provide students and parents access even to evaluations not recorded in school files.

Second, that construction would vastly expand the scope of FERPA's hearing provision, by requiring schools to hold a hearing whenever a student or parent contended an individual grade on individual homework or other class work – or, for that matter, any other evaluation of student work, such as a teacher's comments – was "inaccurate" or "misleading." 20 U.S.C. § 1232g(a)(2). Yet FERPA accords students no right "to challenge their teachers' or educational institution's grading process." *Tarka v. Cunningham*, 917 F.2d 890, 892 (5th Cir. 1990). The legislative history is confirmatory:

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents or student could seek to

> correct an improperly recorded grade, but could not, through the hearing required pursuant to this law, contest whether the teacher should have assigned a higher grade because the parents or student believe that the student was entitled to the higher grade.

120 Cong. Rec. 39,864 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment). Giving parents and students the right to challenge the grade on every assignment would paralyze the assessment of student performance on which education at all levels depends. Congress plainly intended no such thing.

Surely, had Congress intended the FERPA hearing to be a vehicle for challenging unrecorded in-class peer evaluations, the statute or legislative history would at least have alluded to the wholesale federal intrusion into the conduct of education at every school.

Conferral of such a far-fetched right would, as well, collide with the overwhelming weight of judicial authority, which holds academic judgments that support evaluations of students to be "beyond judicial review." *In re Susan M. v. New York Law Sch.*, 556 N.E.2d 1104, 1107 (N.Y. 1990). *See, e.g., id.* at 1105; *Miller v. Hamline Univ. Sch. of Law*, 601 F.2d 970 (8th Cir. 1979); *Wright v. Texas S. Univ.*, 392 F.2d 728, 729 (5th Cir. 1968); *Ward v. New York Univ.*, No. 99 CIV. 8733, 2000 WL 1448641, at *3 (S.D.N.Y. Sept. 28, 2000); *Linson v. Trustees of the Univ. of Pa.*, No. Civ. A. 95-3681, 1996 WL 637810 (E.D. Pa. Nov. 4, 1996); *Alden v. Georgetown Univ.*, 734 A.2d 1103, 1108 (D.C. 1999); *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145, 1149 (D.C. 1985); *Napolitano v. Trustees of Princeton Univ.*, 453 A.2d 263, 275 (N.J. Super. Ct. App. Div. 1982); *Olsson v. Board of Higher Educ.*, 402 N.E.2d 1150 (N.Y. 1980); *Maas v. Corporation of Gonzaga Univ.*, 618 P.2d 106 (Wash. Ct. App. 1980).

Teachers throughout the nation would be required to abandon valuable, time-tested instructional methods if, as the court of appeals held, FERPA's nondisclosure provisions covered every score placed in class on a paper, quiz or homework assignment. For example, many teachers recognize student achievement by posting exemplary quizzes, papers or assignments in the classroom. That practice of sharing examples of excellent work benefits not only the student whose work is prized, but also other students. Similarly, a leading approach to writing instruction includes, as a vital component, peer editing, in which students exchange written work. *See, e.g.*, James A. Reither & Douglas Vipond, *Writing as Collaboration*, 51 College English 855, 855 (1989). There, students necessarily see the teacher's evaluation of other students' work. The holding below would not tolerate that pedagogically sound method and the better understanding of writing it imparts, although the method is integral to curricula in countless classrooms. *See, e.g.*, Robyn M. Gillies & Adrian F. Ashman, *The Effects of Cooperative Learning on Students with Learning Difficulties in the Lower Elementary School*, 34 J. of Special Educ. 19 (2000). Even routine classroom administration, such as having students distribute graded papers and assignments to classmates, would be precluded because student grades could be revealed and, according to the court of appeals decision, FERPA thus violated. When consequences so extreme and harmful are implicated by judicial interpretation, so must be doubt as to its validity.

B. The Court of Appeals Erred in Disregarding the Views of the Agency Charged with Implementing FERPA.

In enacting FERPA, Congress authorized establishment of and delegated to the U.S. Department of Health, Education and Welfare (now, in this respect, the U.S. Department of Education) Family Policy Compliance Office

("FPCO") authority to interpret FERPA and its implementing regulations and provide technical assistance to educational agencies and institutions to ensure compliance. 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.60. Since at least 1993, the FPCO consistently has interpreted FERPA not to cover the very peer-grading technique at issue here. (Petitioners' Appendix at F-2, 3.) Although it acknowledged the FPCO's settled view, the court of appeals rejected it as "not persuasive." (Petitioners' Appendix at A-20.) The court failed to give proper deference to the considered interpretation of the federal agency to which Congress delegated FERPA enforcement authority.

While not entitled to the same degree of deference as regulations or formal rulings, FPCO interpretations of FERPA in opinion letters "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift and Co.*, 323 U.S. 134, 140 (1944). Because the FPCO has "accumulated a considerable experience," *id.* at 137, in regulating under FERPA and "given the 'specialized experience and broader investigations and information' available to it," *United States v. Mead Corp.*, 121 S. Ct. 2164, 2175 (2001) (quoting *Skidmore*, 323 U.S. at 139), it was entitled to "some deference." *Reno v. Koray*, 515 U.S. 50, 61 (1995). The court below should at the very least have placed greater weight on the agency's directly pertinent interpretation of the statutory terms at issue.

The FPCO concluded that in-class peer-grading does not violate FERPA because the grades fall outside the statutory definition of education records. The FPCO Director is charged with investigating, processing, and reviewing complaints and violations under FERPA, and providing technical assistance to schools across the country. The Director's position on point is thus based upon specialized experience, and should be presumed correct

unless clearly in conflict with the statute's plain meaning. Moreover, to the extent that the FPCO's position interprets Department of Education regulations, it is controlling because not "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945). Further, there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Accordingly, the court of appeals erred by not granting deference to the FPCO's longstanding view.

If adopted, the determination of the court below to disregard the FPCO view would cause increased FERPA litigation. Since its enactment, FERPA has been subject to an extraordinary volume and variety of interpretations by students and parents. The FPCO has issued hundreds of opinion letters that interpret the statute. *See* Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469 (2001); *see id.* ("What once seemed like a relatively straightforward statute has become a cumbersome set of requirements with ambiguous parameters."). A judicial failure to give deference to FPCO interpretations would invite complainants to litigate in courts throughout the nation the agency's voluminous technical interpretations of a statute that covers millions of students.

For these reasons, *amici* believe that Respondent's FERPA claim is without merit and that the court of appeals erred in upholding it. However, this Court need not address the merits of the FERPA claim, for the two reasons stated below.

II. CONGRESS DID NOT AUTHORIZE PRIVATE LAWSUITS TO ENFORCE THE FERPA PROVISION AT ISSUE.

Although the court of appeals recognized that FERPA itself confers no private cause of action, the court held that Respondent could bring this action under 42 U.S.C. § 1983. That is a question of first impression in this Court. Based on the analysis in *Suter v. Artist M.*, 503 U.S. 347 (1992), however, it is clear that Congress did not indicate the requisite intent to authorize private suits under Section 1983 to enforce FERPA.

In *Suter*, the Court announced the proper question to be answered in determining whether a private plaintiff may enforce a federal statute under Section 1983: "Did Congress, in enacting the [statute], unambiguously confer upon the * * * beneficiaries of the [statute] a right to enforce the requirement" at issue. *Id.* at 357. Where, as in *Suter* and here, Congress imposes obligations on states pursuant to its spending power, "'[t]he legitimacy of Congress' power to legislate * * * rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" and there can be "no knowing acceptance if a State * * * is unable to ascertain what is expected of it." *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (citations and footnote omitted). Thus, under *Suter*, for a court to find in FERPA a private enforcement right under Section 1983, Congress's intent to confer such a right must be "unambiguous[ ]". *Id.*

FERPA's text reveals utterly no Congressional intent – and certainly not the "unambiguous[ ]" intent *Suter* requires – to permit private enforcement of the provision at

issue here. [2] Nothing in the statute placed States on notice that individual alleged instances of unconsented disclosure of education records would subject them to private enforcement action by individual students and parents. To the contrary, the pertinent section simply provides, subject to various conditions and exceptions, that "[n]o funds shall be made available * * * to any educational agency or institution which has a *policy or practice* of permitting the release of education records * * * *" 20 U.S.C. § 1232g(b)(1) (emphasis added). FERPA thus merely conditions provision of federal funds on local education agencies' establishment of *policies or practices* that do not permit unconsented release of education records. *Francois v. Univ. of D.C.*, 788 F. Supp. 31, 33 (D.D.C. 1992). The statute certainly does not impose on school districts a duty to monitor the classroom methods of individual teachers to ensure that student records are never disclosed; and equally certainly it contains no unambiguous directive to that effect, as it must to authorize private enforcement under Section 1983. *See Suter*, 503 U.S. at 357.

Courts that have properly applied *Suter*'s teaching unanimously have held that an alleged violation of FERPA does not give rise to a private Section 1983 action. [3] *Meury*

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[2] Courts uniformly have held that FERPA itself provides no private right of action. *See Fay v. South Colonie Central Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 579 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988); *Girardier v. Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977).

[3] The only federal appellate authority to the contrary that the court of appeals cited pre-dated *Suter* and relied on cases of this Court that analyzed the question in a manner far more receptive than *Suter* to inferring private enforcement rights. *See* Petitioners' Appendix at A-12 (citing cases). *Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997), a post-*Suter* case that the

v. Eagle-Union Community Sch. Corp., 714 N.E.2d 233 (Ind. Ct. App. 1999); *Norris v. Board of Educ. of Greenwood Community Sch. Corp.*, 797 F. Supp. 1452 (S.D. Ind. 1992). *See Grundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997). Since *Suter*, it has been clear that "when a provision in a statute fails to impose a direct obligation on the States, instead placing the onus of compliance with the statute's substantive provisions on the federal government, no cause of action cognizable under section 1983 can flourish." *Stowell v. Ives*, 976 F.2d 65, 70 (1st Cir. 1992). The FERPA provisions at issue here fall squarely into that category. By FERPA's express terms, Congress set forth a comprehensive mechanism according to which the U.S. Secretary of Education has sole authority to investigate and remedy students' and parents' allegations of FERPA violations. As the post-*Suter* courts recognize, "FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions and protections of FERPA; Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism." *Norris*, 797 F. Supp. at 1465.

The court below failed to apply the analysis in *Suter* because it believed that "any analytical additions announced in *Suter* are 'no longer to be followed' in light of post-*Suter* congressional action." (Petitioners' Appendix at A-12.) The case the court cited for that proposition refers to 42 U.S.C. § 1320a-2, but that provision by its terms only applies to "an action to enforce a provision of" Chapter 7, Title 42 of the United States Code, which pertains to Social Security. The cited provision therefore does not limit the precedential weight of *Suter* in construing other statutes codified elsewhere in the Code, such as FERPA, which is

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court did not cite, permitted a Section 1983 action to enforce FERPA, but failed to apply the controlling analysis of *Suter*.

codified in Title 20. The provision does indicate, however, that Congress apparently believed that *Suter* narrowed the "grounds for determining the availability of private actions." *See id.* Here, therefore, the court below should have applied the more restrictive *Suter* standard. Had it done so, it should have concluded that FERPA is not enforceable under Section 1983.

Instead, the court relied primarily on the two-part test articulated in the Court's prior decision in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). Under that test, "[a] plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.'" *Id.* at 508 (quoting *Wright v. Roanoke Dev. & Housing Auth.*, 479 U.S. 418, 423 (1987)). However, the court of appeals failed to apply that test in light of *Suter*, which added to a plaintiff's burden in such cases the additional showing that Congress "unambiguously" intended to confer private rights under the particular provision of the statute at issue. *See Arkansas Medical Soc., Inc. v. Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993); *Stowell*, 976 F.2d at 70. Applying the *Wilder* test in light of *Suter* clearly reveals that the requisite expression of Congressional intent is absent from the FERPA provision under which Respondent proceeds.

The first part of the *Wilder* test requires the Court to determine whether a federal statute gives rise to an enforceable right under Section 1983. To answer that question, the Court must ask: (1) whether the provision in question was intended to benefit the plaintiff; (2) whether the right protected by the statute is so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding

obligation on the state. *Wilder*, 496 U.S. at 509. FERPA fails on all three counts. First, it requires only that participating school districts have a system-wide plan in place that does not permit the unconsented release of education records or personally identifiable information. 20 U.S.C. § 1232g(b). It does not by its terms prohibit individual disclosures or disclosures not pursuant to a policy or practice of the school district or educational agency that receives federal funds. Because the statute addresses only district-wide or institution-wide policies and practices, it is not clearly intended to ensure that "the needs of any particular person have been satisfied." *Blessing v. Freestone*, 520 U.S. 329, 343 (1997). Nor does it "bind the state" by putting school districts on notice that they are responsible for providing remedies to students for individual disclosure of education records by individual teachers. *See Suter*, 503 U.S. at 357. Finally, if FERPA creates enforceable individual rights, those rights are necessarily "vague and amorphous" because the statute does not specify what obligations education institutions and agencies have to prevent *individual* violations; it only conditions federal funding on recipients' not having certain *policies or practices*, such as preventing students and parents access to their own education records and revealing such records to unauthorized persons without consent.

The second prong of the *Wilder* test requires the Court to determine whether Congress has foreclosed private enforcement of the statute in the enactment itself. Here, Congress's explicit authorization of a funding remedy, with enforcement vested exclusively in the Secretary of Education, 20 U.S.C. § 1232g(f), (g), indicates that Congress did not "unambiguously" impose on school districts the added threat of private lawsuits to enforce individual disclosure of education records. The regulatory enforcement scheme authorized in § 1232g(g) of the statute is detailed and comprehensive.

First, the statute provides that it is "[t]he Secretary" of Education who "shall take appropriate actions to enforce this section and to deal with violations of this section." 20 U.S.C. § 1232g(f). Such "actions" may include "terminat[ing] assistance * * * if the Secretary finds there has been a failure to comply with this section," although the Secretary may only take that step if "he has determined that compliance cannot be secured by voluntary means." *Id.* Further, the statute provides that "[t]he Secretary shall establish or designate an office and review board within the Department [of Education] for the purpose of investigating, processing, reviewing, and adjudicating violations of [FERPA] and complaints which may be filed concerning alleged violations of [FERPA]." 20 U.S.C. § 1232g(g).

The Secretary's regulations established the FPCO within the U.S. Department of Education and charged it with investigating, processing and reviewing complaints and violations under FERPA. 34 C.F.R. § 99.60. In addition, the Secretary designated the FPCO to provide technical assistance to ensure compliance with FERPA. *Id.* Finally, the Secretary designated the Office of Administrative Law Judges to act as a Review Board under FERPA. *Id.*

Further, FERPA and its regulations allow parents and eligible students to file written complaints with the FPCO regarding alleged violations under FERPA. 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.63. The regulations specify the available complaint procedure and set forth the notice to be provided to the educational agency or institution and the complainant. *See* 34 C.F.R. §§ 99.64, 99.65. In addition, the regulations set forth the FPCO's responsibilities in the enforcement process, including that the FPCO provide written notice of its findings upon investigating a complaint and a statement of the specific steps that the agency or institution must take to comply with the FPCO's finding of non-compliance under FERPA. *See* 34 C.F.R. § 99.66.

Finally, the regulations set forth how the Secretary is to enforce decisions regarding complaints. *See* 34 C.F.R. § 99.67.

This comprehensive enforcement system authorized by FERPA demonstrates congressional intent to vest sole responsibility to remedy violations of FERPA in federal authorities. *See Norris*, 797 F. Supp. at 1465.

The same concerns that made the *Suter* Court reluctant to construe Spending Power legislation as conferring privately enforceable individual rights apply with at least equal force to the Spending Power statute at issue here. Legislation enacted under the Spending Clause is much in the nature of a contract, in that States agree to comply with federally imposed conditions in exchange for federal funds. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17. Plaintiffs in cases like this one are not parties to the contract. *Blessing*, 520 U.S. at 349 (Scalia, J., concurring). Such plaintiffs are at most merely third-party beneficiaries. As such, they were not entitled, under the law at the time Section 1983 was enacted, to sue upon the contract. *Id.* (*citing* 1 W. Story, *A Treatise on the Law of Contracts* 549-550 (4th ed. 1856)). Here, accordingly, Respondent has no right of action under Section 1983 because her ability to compel the school district to make good on its promise to the Federal government was not a "righ[t] * * * secured by the * * * laws" under Section 1983.

For these reasons, Respondent failed to state a cause of action by invoking Section 1983 to remedy the alleged FERPA violation.

III. SECTION 1983 HAS NO APPLICATION IN THESE CIRCUMSTANCES.

Even if FERPA were enforceable in a Section 1983 action, plaintiffs below failed to meet the basic requirements

for overcoming the Owasso Independent School District's governmental immunity from such a suit. Because the school district was immune – as were the individual defendants, which the court of appeals correctly held – the case should have been dismissed on those grounds.

To establish a valid Section 1983 claim against a local governmental body, a plaintiff must prove that official policy or custom is responsible for the deprivation of the plaintiff's rights. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978). It is not sufficient to prove that employees of the defendant agency violated a federal right. *Id.* Accordingly, the practice of peer-grading is not actionable unless it was done pursuant to an official policy or custom of the Owasso School Board.

Yet the court of appeals in this case did not rely on any evidence that the Owasso Independent School District, or its school board, had a formal policy authorizing or approving peer-grading. Nor did the court find any evidence of a school board "policy or practice" of denying parents or students access to educational records or releasing educational records without consent. In the absence of such an official policy, the school district was immune from a Section 1983 suit predicated on the actions of its employees. *Id.*

Claims such as those asserted in this case inflict "a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Nowhere is the distraction and expense of litigation more costly to society than in the field of education.

CONCLUSION

Amici respectfully submit that the decision below is unsound as a matter of law and dangerously adverse to the interests of education at all levels in the United States.

Respectfully submitted,

*Julie Underwood, General Counsel
Julie E. Lewis
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

**Counsel of record*

Sheldon E. Steinbach
Vice President and General Counsel
American Council on Education
One Dupont Circle, Suite 800
Washington, DC 20036
(202) 939-9355

Martin Michaelson
Alexander E. Dreier
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5600

Counsel for Amici Curiae